1. Title II is a depression-era rule intended for regulating the AT&T/Ma Bell monopoly

> **TL;DR: A law from another time, yes, but a strong one that's been updated**

The age and regulatory environment of the statute under which the current net neutrality rules are enforced is a common refrain. Title II is in fact part of the far-reaching Communications Act of 1934, which was indeed instated during a period of depression and monopoly — but characterizing it that way is a bit like saying the Declaration of Independence is an "Enlightenment-era rule written by anti-government extremists."

Industries that carried products across state lines, such as railways, had for many, many years been subject to special regulations as "common carriers" in order to ease interstate commerce. These regulations exist at the federal level and split authority with states, which have their own laws for how companies comport themselves within their borders.

Telephone service had begun crossing state lines by this time in 1934, and a unified body for regulating it and the companies that provided it (which were indeed acknowledged monopolies) was called for: hence, the FCC. And Title II is the part of the law that gives the agency authority over common carriers providing interstate or foreign communications services.

The FCC and the 1934 act were not solely created to break up Ma Bell or AT&T; it's a major law that extended existing and working federal rules for interstate commerce to an industry whose growth necessitated it. Of course it would be silly to apply those exact same rules to a vastly different era — that's why we had the Telecommunications Act of 1996, which extensively modernized the original with new definitions and rules.

Notably, no one seems to complain about all the *other* businesses, including some broadband connections and mobile services, that were governed under Title II before the 2015 order and will continue to be so should it be rolled back. Apparently depression-era monopoly rules are just fine for *those.*

It's also worth mentioning here that if people are really afraid of broadband providers being governed by anti-monopoly authorities from the early 20th century, that is a precise description of the FTC, a bona-fide antitrust body established in 1914, and the agency to which regulatory authority would return should the FCC be relieved of it.

2. The 1996 Telecommunications act says the internet should be unfettered by state or federal regulation

> **TL;DR: It was "fettered" for years and did great — plus, that part of the law isn't law, and it's about porn**

You can read the Act here; only one section really gets specific about the internet, and it does indeed say this:

It is the policy of the United States…to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.

Seems pretty straightforward, but context matters: 1996 was a very different time. Broadband was extremely rare and dial-up was the rule. The very fact that most people reached their internet provider *through* a telecommunications provider (regulated under Title II) made things fundamentally different. Think AOL and Earthlink, not NBC Comcast Universal (or, for that matter, Oath).

When the internet provider is essentially *also* the telecommunications provider, in charge of the cables, switches, DNS, and so on, that changes things a great deal. It wasn't as common in 1996, and the internet and web have grown to encompass a whole different paradigm since then.

Part of the argument is that Title II was never meant for broadband services, and that the industry flourished under the "light touch" of Title I. Kind of an inconvenient fact, then, that DSL — the most popular broadband service by far for many years — was regulated under Title II until 2005! In fact, some major DSL providers petitioned to *stay* under Title II at the time.

Do you remember the 1996-2005 era of internet use and provision as being a particularly oppressed one? It was in fact, as the 2015 order's detractors have pointed out themselves, a period of unprecedented growth and economic prosperity, which the Title II regulation of a huge proportion of Americans' internet access clearly did little to dampen.

Also, and this is more of a "by the way" thing: that part of the 1996 Act is actually under Section 230, "Protection for private blocking and screening of offensive material." Read the whole thing and you find it's basically a diplomatic way of saying that that things like porn, as on cable TV, shouldn't be blocked by federal regulation, but by the likes of parents and computer administrators. This isn't a joke, it's an important part of the Act that prevents censorship, but it really isn't about the issue at hand.

And one last note: Section 230 isn't actually a law, just an statement of policy intended to help guide *interpretation* of the law. And courts, whose job it is to interpret law, have long known this and still accepted — even encouraged — Title II regulation.

3. The rules have discouraged investment

> **TL;DR: No company claims this and the numbers are inconclusive at best**

Readers of TechCrunch in particular may be cognizant that strong statements like *X caused Y financial trend* are to be treated with caution — especially when they're based on only a year or so of data. That's certainly the case here: the Open Internet Order came into effect in mid-2015, so we basically have the second half of that year and a chunk of 2016 to work with.

The current FCC administration has suggested there was a decline of about 5 percent in capital expenditure by broadband providers after the Order took effect. But other analyses suggest that some of that apparent decline was planned well ahead of time (a carrier winding down a major infrastructure rollout, for instance), and that overall investment is up. This long report from Free Press (PDF) extensively documents the SEC filings and investor relations documents bearing this out.

Executives of telecoms are on the record saying that net neutrality and Title II won't be affecting their investments much if at all. If they were, they probably would have shouted it from the rooftops, since it would be helpful in the fight to change their classification.

The truth here is that there's not a lot of data, and what we have isn't decisive. However, it's disingenuous of FCC leadership to treat it as though it were, especially in the direction opposite that suggested by industry leadership.

4. It stifles small businesses with reporting and restrictions

> **TL;DR: Potentially, but there are already allowances for**

this

Being regulated under Title II may be more burdensome than the way it was before, but by how much, and is it really a problem? Claims have been advanced by Chairman Pai on behalf of several small businesses and ISPs that supposedly have had to delay or cancel features and services because of the rules.

In letters sent to the FCC by cable associations, small ISPs allege that the rules have increased costs of compliance, and this is certainly possible — but none of the letters include any numbers to back that up. I've asked several of them for specifics like how much they've had to spend, features they've had to abandon, etc, but have yet to hear back from any. (I'll update if I do.)

The cost of figuring out new paperwork was always going to be greater in the first year or two of the new rules, something the FCC acknowledged by exempting carriers under 100,000 subscribers from the transparency reporting part of the rule — a limit later increased to 250,000, despite the fact that the small ISPs complaining in these letters are mostly under 1,000.

I'm skeptical that the no-blocking and no-throttling rules are preventing any useful services from being rolled out, as several ISPs claim. The only one anyone has really pointed at is zero rating, and that's a dubious one. And since the companies claim they're not interested in breaking the other rules as it would be against their interests, there doesn't seem to be any objection to enacting those rules. The main issue is the money.

The CEO of Sonic, a medium-sized (small compared to Comcast and its like) ISP in San Francisco, has repeatedly said that the rules aren't a problem for them. But it could easily be a different story for a company with 500 subscribers and 3 employees.

An allowance or tax break for small companies temporarily under

increased cost of compliance would be a great way to prevent this problem. The FCC is also already attempting to limit the volume of compliance paperwork and has genuinely always made attempts to accommodate those burdened by its regulations. We already tweaked the rule to make it easier on small businesses once, why not do it again?

As a last consideration here, the opponents of net neutrality have characterized it as protecting against "phantom" offenses that have net yet occurred. Leaving aside that this is the purpose and definition of preventative regulation, many of the issues brought up by the smaller ISPs and magnified by FCC leadership are equally phantasmal. Potential problems cannot be considered worth accommodating at this scale but ignored at the larger scale of national ISPs.

5. The "general conduct rule" is vague and open-ended

TL;DR: So change it

The 2015 order has three "bright line" rules: no blocking, no throttling, and no paid prioritization. A fourth, less bright one has been singled out as being so vague and broad as to make almost any practice subject to FCC scrutiny:

[Broadband providers] shall not unreasonably interfere with or unreasonably disadvantage end users' ability to select, access, and use broadband Internet access service or the lawful Internet content, applications, services, or devices of their choice, or edge providers' ability to make lawful content, applications, services, or devices available to end users.

The order's critics have a point. This clause, however well-

intentioned, is quite open ended, something that those being regulated have every right to object to. And former Chairman Tom Wheeler made a severe error when, upon being asked what types of practices could be found to be unreasonable, replied "we don't really know." Too honest by half, unfortunately.

The general conduct rule is behind the inquiry into zero rating, a practice that didn't clearly fall under any of the other rules — and yet poses a serious threat if misused. It's stuff like this that the FCC couldn't predict, and so created a "catch-all standard." All the same, it's hard to disagree with people who call this particular rule too vague.

But ending net neutrality because one rule out of many is poorly defined is the very picture of throwing the baby out with the bathwater. FCC rules are revised all the time; why not revise this one? The general conduct rule could be restricted or even eliminated, and that would leave the other, more critical net neutrality rules intact. That option, however, doesn't appear to be on the table.

6. We're not trying to remove net neutrality rules, just Title II

TL;DR: Removing the rules is literally in the proposal

It is frequently said that the point is not to remove the rules themselves, just change the authority to something a little less heavy-handed.

This is a puzzling assertion to make when the proposal itself asks over and over again whether the "bright line" rules of no blocking, no throttling, etc should be removed. It's pretty clear that proponents don't think the rules are necessary and will eliminate them if they can. Just because they frame their preference in the form of a question doesn't make it any less obvious.

A sort of corollary to this argument is that internet providers will voluntarily adhere to suggested practices. This is a pretty laughable suggestion, and even if it were true, it self-destructs: if companies have no problem subjecting *themselves*to these restrictions, how can they be as onerous as they say?

We'll know more about what is and isn't on the chopping block when the final text of the proposed rules is made available, at which point I'll update this story.

7. The rules work without Title II anyway

TL;DR: Nope, we tried this already

Even if we were to allow that the rules in the 2015 order aren't in danger of removal (they are), the argument is they don't need Title II authority to work. They do, and this is supported by years of attempts.

The FCC tried for the decade before 2015 to enforce non-discrimination and other net neutrality rules using other legal authorities as a basis. Several different tracks were taken: ancillary authority under Title I and Section 706, both of which were rejected by courts as being insufficient for these kinds of strong rules. Hints that Title II was the only way to go have been dropped court after court and eventually the FCC took them at their word.

The FCC's proposal provides no alternatives for authorities under which it would be able to enforce the rules — except for ones already tried and found lacking.

Make no mistake, the rules will not work without Title II. This isn't speculation — it's already been tried.

8. The internet wasn't broken before 2015 and ISPs don't

block or throttle

> **TL;DR: It remained unbroken because of constant vigilance, not because ISPs didn't try**

As evidence that Title II-based rules are unnecessary, critics point to the success of the internet before 2015. Leaving aside that, as we noted above, internet access *was* governed by Title II for a good deal of that period, this argument is true. Of course, it's only true because of constant vigilance by regulators!

Internet providers have attempted to throttle traffic by type or by user (Comcast in 2007), have imposed arbitrary and secret caps on data (AT&T 2011-2014), hidden fees that had no justification or documentation (Comcast in 2016), and tried to give technical advantages to their own services over those of competitors (AT&T in 2016). These attempts were only revealed in retrospect once they were discovered and lawsuits filed. If the deterrents those lawsuits provided eventually had been part of preemptive rulemaking then these practices would never have been attempted at all.

2015 wasn't some magic year, either: the FCC and Congress had proposed net neutrality rules going back more than a decade before then. It's only in 2015 that they made them stick.

Now, even if we were to grant that ISPs had not attempted these things when they clearly did, it would be unreasonable to think that they wouldn't attempt to in the future. Voluntary agreements not to are hardly a substitute for strong rules against anti-consumer practices known to have been instituted before.

9. It takes authority away from the FTC, which has historically guarded privacy rights

> **TL;DR: It does shift authority, but with good reason and**

no loss to consumers

The Federal Trade Commission is another agency formed in the early 20th century that chiefly deals with punishing unscrupulous businesses. And it did in fact have authority for years over broadband providers, and it did punish them for bad practices.

However, the FTC is fundamentally a reactive organization: it waits for something bad to happen, then brings a suit against the actor, leading to fines or changes in practice. For example, it is currently in the process of wrestling with AT&T over shady "unlimited data" claims the company made over the course of several years starting in 2011.

The FCC, on the other hand, preemptively creates regulations by which companies must abide. If some of the rules it has created were in place in 2011, AT&T would have been immediately in violation had it not plainly stated the limits of its "unlimited" plan.

For the case of enforcing strong net neutrality rules, the FCC seems the logical choice.

Part of the issue, however, is that the FTC is barred from regulating Title II carriers, which is how the 2015 Order classifies broadband providers. This was expected, of course, and the FCC quickly created the transparency and Broadband Privacy rules in order to make sure consumers were being provided the same or better privacy protections as under the FTC.

Of course, the same crew that makes the argument listed above seemed to be fine with it when Congress repealed that same Broadband Privacy rule, leaving ISPs with no oversight whatsoever. Their hand-wringing about what's best for everyone's privacy seems rather hypocritical in that light.